Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THOMAS M. SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the materiality element of a perjury before a grand jury violation can be predicated upon evidence that the false statement was material to the grand jury's consideration of a criminal offense for which the grand jury could not return a valid indictment?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Thomas M. Sanders, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 27, 1998.

OPINION BELOW

The Court of Appeals entered a memorandum opinion on February 27, 1998. A copy of the Opinion is annexed hereto as Appendix A.[1] The Court of Appeals denied the petition for rehearing on March 31, 1998. A copy of the denial of the petition for rehearing is annexed hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This appeal in a criminal case is from a district court judgment and sentence following a conviction after jury trial. Defendant Thomas M. Sanders (Sanders) was charged in a one-count indictment filed March 22, 1996,

[1] The caption of this Opinion contains the name of the parties to the proceedings.

with perjury in violation of 18 U.S.C. §1623 (CR 1; ER 1).[2] Sanders was arraigned on the indictment on April 22, 1996 (CR 7).

The indictment charged Sanders with making a "false material declaration" under oath to the grand jury on March 8, 1996.

> [O]n or about March 8, 1996, in the Eastern District of California, being under oath in a proceeding before the grand jury of the United States, [defendant] made a false material declaration knowing the same to be false, to wit: defendant THOMAS SANDERS when being questioned about what happened to certain boxes of documents that were located at 8517 North Weyerhauser, Portland, Oregon, falsely stated they were "not recognizable, burnt" in a fire that occurred at that location on July 8, 1993, when in truth and in fact, as the defendant well knew, the said documents had not been burned; all in violation of Title 18, United States Code, Section 1623.

(CR 1; ER 1-2).

Jury trial for Sanders began on January 7, 1997, and ended on January 8, 1997 (CR 36-39). On January 8, 1997, the jury returned a guilty verdict against Sanders (CR 39; Reporters Transcript, hereinafter referred to as RT 222).

On April 11, 1997, the district court in a bench order denied Sanders' motion for judgment of acquittal and/or arrest of judgment (4-11-97 RT 41-49; ER 128-137).

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[2] CR refers to the Clerk's Record and ER refers to the Excerpts of Record submitted to the Ninth Circuit.

On May 2, 1997, the district court sentenced Sanders to five (5) months imprisonment, to be followed by 3 years supervised release (CR 68; ER 138; 5-2-97 RT 21-25). The district court imposed a fine of $5,000 (ER 138; 5-2-97 RT 23). A special assessment fine of $50.00 was also imposed (ER 138; 5-2-97 RT 23).

Sanders filed a timely notice of appeal on May 2, 1997 (CR 70; ER 141).

BAIL STATUS

Sanders is currently released pending appeal. His release was ordered by the Ninth Circuit on May 30, 1997, and continues pending resolution of this petition.

STATEMENT OF FACTS

On July 8, 1993, Sanders was living with his girlfriend, Geneviere Rich, in a rented one-story house located at 8517 North Weyerhauser, Portland, Oregon (RT 30) when an accidental fire engulfed the house, causing extensive damage to the structure and contents (RT 31). Sanders had rented the house from Shipper's Dispatch (RT 32), a company run by his brother, James Sanders, who was later to become a subject of a criminal investigation by the government. The fire was extinguished by firemen in ten minutes, and they remained at the scene for another two hours overhauling the structure (RT 81-82). Debris from the fire, including boxes, were piled up in the yard of the damaged premises (RT 82, 97-98).

In early December, 1993, the grand jury in the Eastern District of California issued a subpoena *duces tecum* to the custodian of the records for Shipper's Dispatch Association and James Sanders – seeking certain of Shipper's Dispatch's records, specifically twenty-two types of documents purportedly generated during Shipper's Dispatch's business operations (RT 54-56; Government Exhibit 2; ER 112-117). On March 24, 1994, responding to the grand jury subpoena, James Sanders wrote a letter to Assistant U.S. Attorney Daniel Linhardt which was entitled "Statement of Compliance, and Further Information," which was in direct reference to the grand jury subpoena issued on December 9, 1993 (RT 56-58; Government Exhibit 3; ER 118-127). On page 9 of his compliance statement, James Sanders explained that some of the documents requested were lost in a fire at 8517 North Weyerhauser, a place used for storage by Shipper's Dispatch.

> In the second place, as Mr. Uhle has mentioned to Todd Davis, an undetermined percentage of the documents requested in the subject subpoena were lost in a file at SDA's data processing and storage facility at 8517 N. Weyerhauser, in Portland, as noted in the "State of Oregon Fire Report" and supporting documentation attached hereto as Appendix "E" hereof. This facility, which served as a workplace and residence for my brother, Lt. Col. Thomas M. Sanders (USAF Ret.), housed the agency program's main computer, as well as extensive files of corporate and other paperwork either waiting to be scanned and stored in a non-digital format, or waiting to be organized for long term storage away from the main office. Col. Sanders

> is an experienced computer programmer, and holds both a bachelor's and master's degree in electrical engineering. The structure was totally destroyed, and nothing could be salvaged. Col. Sanders lost all of his clothing and other personal effects in the fire.

(RT 57-58; Government Exhibit 3, p. 9; ER 126). James Sanders also stated that "a large percentage of the documents requested in the subject subpoena have never existed . . . " (Government Exhibit 3, p. 9; ER 126).

James Sanders eventually produced documents to the grand jury (RT 58). Some of the requested documents, however, were missing (RT 58).

On September 15, 1994, James Sanders and Robert M. Wright were indicted in the Eastern District of California on several federal charges involving the operation of Shipper's Dispatch. The Assistant United States Attorney handling the James Sanders indictment later opened a new grand jury investigation to indict James Sanders for making a false statement in regards to the previously issued grand jury subpoena duces tecum, a purported violation of 18 U.S.C. §1001 (RT 58-59).

On March 8, 1996, Sanders, before the grand jury, testified that the entire contents of the house were damaged from the smoke and fire on July 8, 1993 (RT 31). During his questioning, Sanders falsely told the grand jury that some of the damaged boxes were "not recognizable, burnt." While questioning about boxes in the attic and elsewhere, the Assistant United States Attorney asked Sanders the following series of questions:

Q. So all those boxes that were up in the attic –

A. Well, I saw a lot of them out in the front yard in another picture, but that's – I couldn't tell where they came from.

Q. Now, so let me just see if I have this right. Did you take – you took three boxes of your stuff out of the middle bedroom?

A. Well, maybe three, I'm not sure of the exact –

Q. Maybe two, maybe three?

. . . .

Q. Okay. Every – the reason you didn't take the other stuff as now I understand it is because the other stuff was destroyed?

A. Yes.

Q. Okay. And it was destroyed by fire or by smoke?

A. Fire, smoke, heat, whatever.

Q. So – but it was – they were just ruined by the fire – they were actually burned, I mean, opposed to burned with a match, flame-type destroyed?

A. No, they were discolored by heat and smoke. And they had that smoke smell that you'd never get out.

Q. But if there was a document, would it make any difference to you? I mean, wouldn't you care to want to save the document? A. Well, I saved – that's what I did.

Q. You saved yours?

A. Yes, everything else was –

Q. And you didn't save the other ones?

A. Everything else was damaged. If it was –

Q. Now by damage –

A. I took –

Q. – *what do you mean by damage, that's what I'm trying to find out here.*

A. *Not recognizable. burnt.*

Q. Oh, okay. Fine.

A. Yeah.

(RT 48-50; ER 106-108) (emphasis added). The government's evidence at trial was that the boxes in the bedroom were not burned, heat damaged, or water damaged (RT 90).

According to the government's theory at trial, Sanders' false statement was material to the decision of whether to indict James Sanders for a violation of 18 U.S.C. §1001. Its evidence on materiality was that the false statement was only material to the grand jury's decision on a §1001 violation. According to Special Agent Davis of the FBI, who testified for the government at trial, if Sanders had testified that no Shipper's Dispatch records had been burned during the fire, that statement would have been material to the grand jury investigation of James Sanders (RT 59). Sanders' testimony that Shipper's Dispatch documents did burn in the fire made it more difficult to prove that James Sanders had made a false statement in violation of §1001 (RT 59-60).

Q. And if the grand jury believed his testimony alone, could that have influenced our

> decision whether or not to indict or influence your decision whether to ask for our decision whether to ask for an indictment?
>
> A. I believe so.

(RT 60). Sanders needed to testify that no records were destroyed in order to prosecute James Sanders for a violation of 18 U.S.C. §1001 (RT 69-70).

REASON FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Determine Whether a Perjury Conviction Can Be Supported By Evidence that the False Statement was Material to the Grand Jury's Decision to Investigate a Crime Upon Which it Could Not Return a Valid Indictment.

A. Importance of the Issue:

This Court has never expressly addressed what evidence can support the materiality element of a perjury conviction. After *Gaudin v. United States*, 515 U.S. 506 (1995) it is clear that the issue of materiality for a perjury conviction is a matter of fact for the jury. This case presents the issue whether there is a failure of proof when the evidence introduced by the government at trial on the element of materiality is that the purportedly false statement affected the grand jury's decision to indict for a specific crime for which it could not return a valid indictment. The government in this case based its perjury conviction against Sanders upon the legally erroneous proposition that his false statement affected the grand jury's decision whether to indict his brother James Sanders for a violation of 18 U.S.C. §1001. To allow

Sanders' conviction to stand would be a miscarriage of justice because the evidence on the materiality of his false statement is legally nonexistent. A decision by this Court on what constitutes sufficient proof of materiality would resolve this important issue of first impression and give the Circuit Court of Appeals clear guidance of what constitutes sufficient evidence of materiality in false statements and perjury prosecutions.

B. Statement of Facts:

The evidence on the element of materiality in this case is insufficient as a matter of law and fact. The government's evidence was that Sanders' false statement about boxes being "not recognizable, burnt" was material because it influenced the grand jury's investigation of James Sanders for a violation of 18 U.S.C. §1001. However, James Sanders made his alleged false statements in response to a grand jury subpoena and thus the grand jury could not indict James Sanders for a violation under 18 U.S.C. §1001. The grand jury is not an administrative agency but rather part of the judiciary and under *Hubbard v. United States*, ___ U.S. ___, 115 S.Ct. 1754 (1995) there is no violation under 18 U.S.C. §1001 for making false statements to a judicial body. Thus, even assuming the grand jury had been properly convened, Sanders' false statement that some "boxes" were "not recognizable, burnt" was not material to the grand jury inquiry.

Under 18 U.S.C. §1623, a false statement before a grand jury does not constitute perjury unless it is material. 18 U.S.C. §1623(a), (c)(1); see *United States v. Ponticelli*, 622 F.2d 985, 989 (9th Cir.), *cert. denied*, 449 U.S.

1016 (1980); *United States v. Prantil*, 764 F.2d 548, 557 (9th Cir.1985). The materiality of a false statement is one of the essential elements of a perjury conviction. *United States v. Rubio-Topete*, 999 F.2d 1334, 1341 n.2 (9th Cir.1993) [citing *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)]. For purposes of 18 U.S.C. §1623, false statements to a grand jury are material if they are relevant to any matter before the grand jury and their falsity "would have the natural tendency to influence the grand jury's investigations." *United States v. Ponticelli, supra*, 622 F.2d at 898; *United States v. Gordon*, 844 F.2d 1397, 1404 (9th Cir.1988) [quoting *United States v. Kelly*, 540 F.2d 990, 993 (9th Cir.1976), *cert. denied*, 429 U.S. 1040 (1977)].[3]

The government's theory at trial on materiality was that Sanders' false statement affected the decision of the grand jury whether to indict Jim Sanders for a violation of 18 U.S.C. §1001 for his own false statement.[4] Todd

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[3] Materiality, an element of the crime charged, has to be proved by the government by competent evidence. In order to support a conviction for perjury under 18 U.S.C. §1623 the government must prove beyond a reasonable doubt that the perjurious statement to the grand jury was material. See *Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544, 1548 (1997). This is for the jury to determine. *Id.* at 1548; *Gaudin v. United States*, 515 U.S. 506 (1995).

[4] The government's theory, and accordingly its proof on the element of materiality, turned out to be fatally flawed. But the defense has no obligation to remind the government of its obligation to prove each element of the crime. It is axiomatic that the government has the ultimate burden of proof. See *United States v. James*, 987 F.2d 648, 651 (9th Cir.1993) (government failed to introduce evidence of the banks' "FDIC" status in a bank robbery prosecution).

Davis, Special Agent for the FBI, testified for the government and provided the evidence on materiality:

> Q. *And was a new grand jury investigation ever opened to determine whether probable cause existed to seek an indictment for James Sanders for making a material false statement to the Government in violation of Title 18. United States Code. Section 1001?*
>
> A. *Yes.*
>
> Q. In connection with that investigation, was Thomas Sanders the defendant in this case, subpoenaed to testify before a federal grand jury, the federal grand jury, in fact, that was examining whether the – James Sanders' statement that documents called for in the subpoena that was Exhibit 2 had been burned during the fire on Weyerhauser in Portland, would that have been material for you?
>
> A. Yes.
>
> Q. Now, if Thomas Sanders had testified that no Shipper's Dispatch documents had been burned during the fire on Weyerhauser in Portland, would that have been material for you?
>
> A. Yes.
>
> Q. Would you please explain to the jury how that would be material.
>
> A. Well, that would prove that the statement that I just read was false, wherein he was describing "an undetermined percentage of the documents were lost in a fire."
>
> Q. Are you aware that he, that Mr. Thomas Sanders testified in a grand jury – well you've read; I guess you are – that Shipper's Dispatch documents did burn in the fire?

A. Yes.

Q. And is that material in connection with your investigation, and if so, why?

A. Yes. Because it would make it much more difficult to prove that his brother James Sanders had made a false statement in this letter that I read.

Q. And if the grand jury believed his testimony alone, could that have influenced your decision whether or not to indict or influence your decision whether to ask for our decision whether to ask for an indictment?

A. I believe so.

(RT 59-60) (emphasis added). Later, on redirect examination, Mr. Davis was asked:

Q. Mr. Davis, as someone who's investigated a hundred white collar cases, in terms of the ease of proving a false statement to the Government's case against James Sanders, where he says to you in a letter the documents are destroyed by fire, if you could establish that no documents were destroyed by fire, would that make it a much easier case against Mr. James Sanders?

A. Yes.

Q. *So that whether or not any of the documents you called for in the subpoena were there or not. would it have helped your one double oh one investigation. the grand jury's one double oh one investigation, if Mr. James Sanders – I'm sorry – Thomas Sanders had testified that no documents were destroyed in the fire?*

A. *Yes.*

Q. Would that have shown that Mr. James Sanders' statement to you where he said, "I can't produce documents because they were destroyed in the fire" was false?

A. That's correct.

(RT 69-70) (emphasis added).

Therefore, this case involves a complete failure of evidence regarding the materiality of Sanders' statement to the grand jury on March 8, 1996. According to the proof offered by the government, Sanders' false statement to the grand jury was *only* material to the grand jury's decision whether to indict James Sanders for a violation of 18 U.S.C. §1001. All the evidence presented at trial on materiality focused on the grand jury's investigation of James Sanders for making a false statement in violation of 18 U.S.C. §1001 (RT 58-60, 69-70). The jury heard nothing else regarding the materiality of Sanders' false declaration to a grand jury.

Moreover, it cannot credibly be argued that the grand jury in this case was convened to investigate more than a violation of 18 U.S.C. §1001. The general proposition that a grand jury may investigate any violation of federal law is of no help to the government in this case. See generally, *United States v. McInnis*, 601 F.2d 1319, 1327 (9th Cir.1979); *United States v. Sisack*, 527 F.2d 917, 920 (9th Cir.1973); *United States v. Percell*, 526 F.2d 189, 190-191 (9th Cir.1975). First, no one from the grand jury ever testified that the scope of their inquiry was broader than investigating James Sanders for 18 U.S.C. §1001. See *United States v. Cosby*, 601 F.2d 754, 757 (5th Cir.1979) (conviction

reversed because there was no evidence from grand jury members as to the scope of the grand jury's investigation). But more importantly, the jury only heard any evidence that Sanders' false statement was material to the grand jury's investigation of James Sanders for a violation of 18 U.S.C. §1001.

Because the government at trial produced evidence that a grand jury was convened only to investigate James Sanders for making false statements in his response to the grand jury's subpoena *duces tecum,* a violation of 18 U.S.C. §1001 (RT 58-59), the materiality of Sanders' testimony before the grand jury depended upon the jurisdiction of the grand jury to investigate and prosecute James Sanders for 18 U.S.C. §1001. The general proposition that the government has broad discretion as to who to prosecute and whether to prosecute at all is irrelevant to the issue whether the grand jury had jurisdiction to return an indictment against James Sanders for 18 U.S.C. §1001, the only crime (according to the evidence adduced at trial) that the grand jury was investigating.

The government obviously can prove "materiality" by a broad range of alternatives. See *United States v. Ostertag,* 671 F.2d 262, 265 (8th Cir.1982) (government may prove materiality in various ways). There was no objection at trial as to the method and manner of its proof. Still, given this broad range of alternatives, the government must bear the consequences of its decision. According to the proof adduced at trial, the grand jury was convened to investigate a violation of 18 U.S.C. §1001 by James Sanders for his purportedly false statement to the grand jury. The government proved that Sanders' false testimony before the grand jury affected the grand

jury's decision whether to indict for a violation of 18 U.S.C. §1001. However, as a matter of law, the grand jury could not have returned an indictment against James Sanders for a violation of 18 U.S.C. §1001 because his false statement was to an arm of the court, not an administrative agency, and thus not prosecutable under 18 U.S.C. §1001. Therefore, the proof on materiality failed because Sanders' false statement could not have been material to the grand jury's decision to indict for a violation of 18 U.S.C. §1001.

In this case, no rational trier of fact could have found the element of materiality beyond a reasonable doubt. It was legally impossible for a grand jury to have been affected in its decision whether to indict James Sanders for a violation of 18 U.S.C. §1001 no matter what Sanders said before the grand jury. Yet, all the evidence presented at trial on materiality focused on the influence Sanders' false statement had on the grand jury convened to investigate James Sanders for making a false statement in violation of 18 U.S.C. §1001 (RT 58-60, 69-70). The government repeatedly stressed to the jury that Sanders' false statement was material in that it directly affected the 18 U.S.C. §1001 charge the grand jury was investigating (RT 185-186). All the evidence presented at trial, and all the argument made by counsel,[5] announced to the jury that

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[5] In his closing argument, government counsel argued that James Sanders could not be indicted for 18 U.S.C. §1001 because Sanders lied to the grand jury:

> And the other is materiality. Was it material? Well, you heard Agent Davis testify that the Government was looking at Jim Sanders. . . . The point was, was the statement Jim Sanders made to the government in

Sanders' false statement was material because it affected the grand jury's decision whether or not to indict James Sanders for a violation of 18 U.S.C. §1001.

CONCLUSION

For the foregoing reasons, petitioner Thomas M. Sanders respectfully suggests a writ of certiorari should issue in this case.

Dated: May 14, 1998

Respectfully submitted,

GEORGE C. BOISSEAU

Attorney for Petitioner
Thomas M. Sanders

Exhibit 3 false? *If it was false. he could have been indicated (sic) under 18 U.S.C. §1001. He could have been indicted under that section.* And if there was no fire, then the statement was false. So materiality is not really an issue as to whether the statement of Thomas Sanders that the documents were burned is false.

(RT 185-186).

APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS SANDERS, Defendant-Appellant.	No. 97-10210 D.C. No. CR-96-00122-GEB **MEMORANDUM***

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted February 12, 1998**
San Francisco, California

(Filed Feb. 27, 1998)

Before: SNEED, KOZINSKI and THOMPSON, Circuit Judges.

Substantial evidence supported the jury's verdict that Sanders was guilty of perjury. He testified that the boxes were "not recognizable, burnt." A rational trier of fact

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

could have found beyond a reasonable doubt that this testimony was false.

The testimony was material to the Grand Jury's investigation. The Grand Jury was properly convened to investigate whether Sanders's brother made a false statement in response to a Grand Jury subpoena. The Grand Jury was authorized to investigate the possible violation of federal law even if its investigation would not result in an indictment. *See United States v. Sisack*, 527 F.2d 917, 920 (9th Cir. 1976).

The Assistant United States Attorney's questioning of Sanders was sufficiently precise to support the perjury conviction, and the government did not set a "perjury trap" for Sanders by calling him before the Grand Jury and questioning him.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS SANDERS, Defendant-Appellant.	No. 97-10210 D.C. No. CR-96-00122-GEB ORDER (Filed Mar. 25, 1998)

Before: SNEED, KOZINSKI and THOMPSON, Circuit Judges.

The petition for rehearing is denied.